No. 96-1829

In The

Supreme Court of the United States

October Term, 1996

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

CROW TRIBE OF INDIANS; and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

Respondents find unremarkable, and unworthy of review, a judgment requiring a State and a local government to refund taxes, which they are legally entitled to keep as against the actual taxpayer, to third parties because a court determines that equity would be served by the refund. In respondent United States' words, "[t]here is nothing novel about the court of appeals' exercise of equitable authority to require petitioners to surrender the proceeds of their illegal taxes." Brief for United States in Opposition ("U.S. Opp'n") at 19.

Nonetheless, the reasoning and result below are not only unprecedented but also in direct conflict with a decision issued only four years ago by this Court, *United States v. California*, 507 U.S. 746 (1993), and the Tenth Circuit's opinion in *Ute Indian Tribe v. State Tax Commission*, 574 F.2d 1007 (10th Cir.), *cert. denied*, 439 U.S. 965 (1978). It consequently comes as no surprise that neither respondent Crow Tribe nor the United States chooses to discuss the salient aspects of *California* and that the respondents largely abandon the theory of recovery they advanced prior to *California*'s issuance: a common law claim in assumpsit for quasi-contract relief. They instead contend that the Ninth Circuit's ruling merely exemplifies the exercise of a federal court's "equitable powers to correct wrongs inflicted on plaintiffs due to invasions of their federally secured rights." Brief for Crow Tribe in Opposition ("Crow Opp'n") at 18. Respondents' concept of essentially standardless remedial authority ignores the need to establish a viable cause of action before *any* relief may be awarded and merely underscores why the Ninth Circuit's judgment warrants review.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH *CALIFORNIA*.

A. *California* Did Not Turn on Whether the Taxes Were Invalid Under Federal or State Law.

The Tribe and the United States distinguish *California* on the ground that the issue there "was whether the Court should recognize a cause of action under federal common law permitting the United States to attempt to recover state taxes it claimed its contractor should not been required to pay as a matter of state law." U.S. Opp'n at 16; *see also* Crow Opp'n at 19-20. Both respondents then focus their discussion on that portion of *California* refusing to find a right of subrogation free of compliance with state limitation requirements. Crow Opp'n at 20-21, 25; U.S. Opp'n at 15-16, 18 n.10.[1] The aspect of *California* relevant here, however, is the analysis addressing the absence of a common law claim lying in quasi-contract, and respondents entirely ignore that analysis. In *California*, this Court held that where, as here, the actual taxpayer relinquished the right to recoupment, the

[1] In its subrogation analysis, this Court reasoned that " 'the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assigner, which public policy does not forbid.' " *California*, 507 U.S. at 758 (quoting *Guaranty Trust Co. v. United States*, 304 U.S. 126, 142 (1938)). Neither the Tribe nor the United States has claimed here to be proceeding in Westmoreland's stead; rather, they have sued in their own sovereign capacities, as the United States had in *California* with respect to the quasi-contract, but not the subrogation, claim. *See California*, 507 U.S. at 757-58. The United States' suggestion (U.S. Opp'n at 18 n.10) that the quasi-contract claim in *California* was maintained derivatively of the contractor's rights refers to the Court's discussion of the subrogation issue, not to the earlier quasi-contract analysis.

Government had no federal common law cause of action in quasi-contract. The Court's holding did not turn on whether the taxes were illegal under federal or state law, and it controls this case.

In seeking to distinguish *California*, respondents do not indicate why the *quasi-contract* standards applied by this Court in rejecting the United States' claim in *California* should differ simply because the challenge to the Montana taxes arose under federal rather than state law. *See* Pet. at 16. Indeed, the United States itself argued in *California* that "[t]he court of appeals erred in suggesting . . . that the fact the federal claim is for recovery of taxes that are unlawful under state law, rather than under federal law, is of relevance to this case," since "[t]he federal cause of action for money had and received applies whenever federal funds have been 'wrongfully, erroneously, or illegally paid.' " Brief for United States at 24, *United States v. California*, *supra* (No. 91-2003). Although this Court ultimately rejected the United States' theory with respect to existence of a viable quasi-contract claim, it did so not because the alleged infirmity in the California tax was state law-based but because the Government could not recover in quasi-contract taxes imposed on another.

Reflective of the respondents' failure to come to grips with *California*'s quasi-contract analysis is their reliance on plainly inapposite decisions to justify the Ninth Circuit's decision. Crow Opp'n at 23-24; U.S. Opp'n at 16. Tellingly, none involved a quasi-contract claim. This Court's decision in *Snepp v. United States*, 444 U.S. 507 (1980), stressed by the Tribe, presented the question whether a constructive trust should be imposed on royalties received by a former Central Intelligence Agency agent from a book whose publication violated his employment contract with the CIA. The Court concluded

that a constructive trust was proper in view of the high level of trust reposed in the employee, which rendered his breach of contract a breach of trust, and the absence of any other meaningful remedy. *Id.* at 514-16. No less unhelpful are the cases alluded to in passing by the United States: *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), which found statutory authority under section 205(a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 53, to require restitution to tenants of rents in excess of permissible amounts; and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), which held that Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, did not evince a congressional intent to preclude an award of damages in connection with a sexual harassment claim brought under the statute. Respondents necessarily go so far afield because the one case directly on point, *California*, is so contrary to their position.

B. Under the Circumstances Here, Federal Remedial Authority Must Be Exercised Within the Boundaries of Established Quasi-Contract Principles.

Because recovery of Westmoreland's tax payments in general, and the Ninth Circuit's decision in particular, are insupportable under the quasi-contract principles applied in *California*, respondents alter the theory underlying their claim. The United States thus states that "petitioners' claim that the decision of the court of appeals conflicts with this Court's decision in *California* reflects a 'misunderstanding over the difference between a cause of action and the relief afforded under it.' " *Id.* at 17.

It is respondents, not petitioners, who confuse the existence of a cause of action with the authority of a federal court to award relief once a claim has been

proven. In their view, the "cause of action" here is the determination that the Montana severance and gross proceeds taxes are preempted by federal law. Crow Opp'n at 21; U.S. Opp'n at 14-15. They accordingly attempt to justify the Ninth Circuit's judgment on the assertion that a federal court possesses virtually unconstrained discretion to fashion whatever equitable remedies it feels accomplishes its sense of a just result once a federal law violation is established.[2] However, as this Court stated in *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 63 (1975), even when a federal right is shown to have been violated, "it by no means follows that the plaintiff . . . is relieved of the burden of establishing the traditional prerequisites to relief." Put otherwise, "the conclusion that a private litigant could maintain an action for violation of [a federal statute] mean[s] no more than that traditional remedies [are] available to redress any harm which he may have suffered; it provide[s] no basis for dispensing with the showing required to obtain relief." *Id.*; *accord Deckert v. Independent Shares Corp.*, 311 U.S. 282, 288-89 (1940); *cf. Heck v. Humphrey*, 512 U.S. 477 (1994) (sufficiency of claim under 42 U.S.C. § 1983 alleging that defendants engaged in various forms of misconduct by pursuing prosecution must be resolved with reference to common law malicious prosecution standards).

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[2] Respondents assume the restitution relief ordered by the court of appeals is equitable in nature. Crow Opp'n at 17; U.S. Opp'n at 19. However, a claim lying in assumpsit for money had and received is an action at law. *See generally* I George E. Palmer, *Law of Restitution* § 1.3, at 9 (1978). That assumption can be indulged for instant purposes since, "[i]n substance, the principles underlying restitution, whether at law or in equity, are much the same." 5 *Moore's Federal Practice* ¶ 38.24[2], at 38-207 (1994).

The "cause of action" here is respondents' claimed entitlement to $58.2 million in taxes paid to the petitioners by Westmoreland. That those taxes were paid pursuant to statutes subsequently held preempted does not "dispens[e] with the showing required to obtain relief," and the elements of the required showing are furnished by the theory identified in respondents' amended complaints: assumpsit for money had and received or, in more modern terms, quasi-contract. Pet. App. 243, 252. One of those elements is the taxes' preemption, but, contrary to the effective position of respondents, the mere fact of preemption does not authorize a federal court to direct "disgorgement" of taxes admittedly held lawfully as against the actual taxpayer. *See* Crow Opp'n at 6. The propriety of the relief sought by respondents instead must be measured against common law standards governing quasi-contract actions, and "it is open to the defendant to show any state of facts which, according to those standards, would deny the right." *Stone v. White*, 301 U.S. 532, 535 (1937). The controlling standards were applied in *California* and cannot be squared with the result below.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *UTE*.

Respondents see no conflict with *Ute* because of supposed factual differences, including the Montana taxes' amount, their impact on the Tribe's income, and their "impos[ition] upon property owned by the Tribe." U.S. Opp'n at 19; *accord* Crow Opp'n at 27-28. The first two of these alleged distinctions, as discussed below in connection with the broad implications of the Ninth Circuit's decision, do not provide a ready basis to differentiate this matter from *Ute* or any other case where preemption is found. The third distinction is similarly nonexistent, since

the legal incidence of the Montana taxes fell on the act of severance by Westmoreland, not on the Tribe's property (Pet. App. 178-80), and therefore was indistinguishable from the legal incidence of the Utah tax which fell on the act of buying personal property or goods from the tribal enterprise (*Ute*, 574 F.2d at 1008).

Ute embodies the traditional rule that tax payments may be recovered by taxpayers, not third-party strangers to the relationship between the taxing government and the taxpayer. *California*, in turn, made explicit that this basic precept could not be evaded by employing quasi-contract principles. The Ninth Circuit's decision departs dramatically from the accepted rule and thereby runs squarely counter to the Tenth Circuit's ruling. Whatever the factual differences between the cases, they do not obscure this fundamental conflict.

III. THE NINTH CIRCUIT'S STANDARDLESS APPROACH TO DETERMINING QUASI-CONTRACT CLAIMS BY NONTAXPAYERS HAS FAR-REACHING IMPLICATIONS FOR THE ORDERLY ADMINISTRATION OF STATE TAX STATUTES.

Respondents discount the contention that the Ninth Circuit's opinion departs radically from accepted quasi-contract principles and characterize the lower court's holding as "a fact-specific conclusion . . . amply supported by the record." U.S. Opp'n at 20; *accord* Crow Opp'n at 15. Reduced to its essentials, the "fact-specific" qualities seized upon by respondents are the " 'extraordinarily high' " nature of the Montana taxes and the fact that the taxes had a negative impact on the royalties the Tribe could obtain or taxes it could impose. Crow Opp'n

15-16; U.S. Opp'n at 21.[3] They do not explain why these factors dictate quasi-contract recovery of Westmoreland's taxes but not recovery of third-party taxes whenever a state tax has been held preempted.[4]

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[3] The Tribe also suggests that the taxes had a "devastating impact on [its] mineral wealth." Crow Opp'n at 16. The record does not support this suggestion. *See* Pet. App. 100 (conclusion in *Crow II* that "Montana has failed to rebut evidence that the taxes had at least *some* negative impact on the coal's marketability") (emphasis supplied); *id.* 54-57 (COL ¶¶ 36-46) (district court's conclusions rejecting claim that the state taxes were a causative factor in Shell Oil Company's failure to develop the Youngs Creek Mine).

[4] The Tribe points to the Ninth Circuit's statement that "Westmoreland was willing to pay coal taxes to the Tribe as early as 1976" (Pet. App. 12) as supporting recovery of Westmoreland's state tax payments. Crow Opp'n at 21 n.13. The factual problem with such reliance is twofold, since the Tribe did not have a tax in place during the 1976-82 period because the Secretary of the Interior had disapproved application of the 1976 tribal severance tax to ceded strip mining and since Westmoreland would have refused to pay any such tax without secretarial approval. Pet. App. 31 (FOF ¶ 31), 51 (COL ¶ 30). The legal problem is that Westmoreland's willingness or unwillingness to pay a tribal tax did not establish any quasi-contractual obligation on petitioners' part to pay over to the Tribe or the United States state taxes Westmoreland paid without protest, any more than "California's demand that WBEC pay what California believed to be a lawful debt [made] California legally responsible for the Government's indemnification of WBEC." *California*, 507 U.S. at 756. The United States adopts a different tack, suggesting that, regardless of whether Westmoreland would have paid a nonexistent tribal tax, it would have paid higher royalties. U.S. Opp'n at 21 n.11. Aside from the absence of any showing as to how much more in royalties Westmoreland supposedly would have paid, this alternative theory of quasi-contract recovery is compromised for the same reason as the Tribe's. In sum, respondents cannot use quasi-contract recovery to compensate for the Secretary's

The reason for the lack of an explanation is that there is none. The very determination that a state tax's imposition on a nonmember is preempted carries with it a determination that tribal interests, which invariably include an economic component, have been prejudiced. *See, e.g., Ramah Navajo Sch. Bd., Inc. v. Bureau of Rev.*, 458 U.S. 832, 842 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150 (1980). At bottom, therefore, respondents propose, and the Ninth Circuit's decision supports, recognizing a federal common law theory of recovery of the type sought here whenever a state tax is held preempted. In the area of Indian law, where challenges to an assortment of state taxes are commonplace and the preemption standards are – at least on the lower court levels – less than precise in application,[5] the ramifications of respondents' theory are significant and virtually certain to spawn a new category of high stakes litigation. As the briefs filed in support of the petition by the seventeen amici curiae States and the Multistate Tax Commission further indicate, the implications of the Ninth Circuit's ruling extend far beyond challenges by tribes with or without the United States' support. In practical terms, the decision below means that States

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action on one hand or, on the other, the Tribe's inability to arrive at a mutually agreeable royalty arrangement that would have created an incentive for Westmoreland to seek recovery of its state tax payments consistently with Montana law. *Cf. California*, 507 U.S. at 759 ("[n]othing in our decision prevents the Government from including in its contracts . . . a contract term that likely would remove any disinterest a contractor may have toward litigating in state court").

[5] *See, e.g., Yavapai-Prescott Indian Tribe v. Scott*, No. 96-16416, 1997 U.S. App. LEXIS 15899 (9th Cir. June 30, 1997); *Gila River Indian Comm'y v. Waddell*, 91 F.3d 1232 (9th Cir. 1996).

have no assurance that, once taxes have been paid without available protest or other refund procedures being initiated by the taxpayer, those revenues may be expended without fear of future refund liability.[6]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[6] Since what is at issue is a federal common law claim capable of being asserted in federal or state court, the Tribe's contention that the United States' participation, and with it the absence of Eleventh Amendment immunity, renders this case sui generis is mistaken. Crow Opp'n at 16; *see* Brief of Amici Curiae States of California et al. at 1 ("under the Ninth Circuit's reasoning any nontaxpayer who has borne significant economic burden as a result of a state tax could use a federal common law quasi-contract cause of action in an attempt to challenge directly in state court the validity of that state tax (*e.g.*, claim a violation of the Commerce Clause) and, if successful, recover from the state all moneys paid by the actual taxpayer").